No. 2672

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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EXAMINER PRINTING COMPANY (a corporation), and WILLIAM RANDOLPH HEARST,
*Plaintiffs in Error,*

vs.

TAGGART ASTON,
*Defendant in Error.*

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## REPLY OF DEFENDANT IN ERROR TO SUPPLEMENTAL POINTS AND AUTHORITIES OF PLAINTIFFS IN ERROR.

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JACOB M. BLAKE,
*Attorney for Defendant in Error.*

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*Filed this.....day of March, 1916*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*

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Section 2053 of the Code of Civil Procedure of California is as follows:

> "Evidence of good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such person or witness has been impeached, or unless the issue involves his character."

To merely state the statute in its terms would seem to be all that is necessary to rebut the presumption that the Supreme Court of California had it in mind in deciding Davis v. Hearst. Any

such presumption, however, has been directly rebutted on the trial of this appeal. Counsel for the plaintiffs in error have squarely met the challenge set forth in our brief when they admitted on the oral argument that the question of the construction of the foregoing section was not presented in any form to the Supreme Court.

Such an admission is binding upon the parties in this Court.

Pitcairn v. Phillip Hiss Co., 113 Fed. 492.

It is only necessary to refer to the opening brief of the plaintiffs in error and note how strongly they insist upon the rule laid down in authorities, drawn from every possible quarter, which would seem to point to a different rule than that set forth in section 2053, to determine how justly the Court below held that their objection to the admission of the testimony in question was too general to support an exception. The very vigor with which they urge that this Court must presume an intention on the part of the Supreme Court of California to construe the statute in Davis v. Hearst, is a confession, in our judgment, that the rule laid down in that case is in the teeth of the statute: and a necessary corollary to this statement is that if any presumption is to be raised, it is one of invited error on the part of the plaintiffs in error where, under the facts as they appear here, no specific objection was made which would call the attention of the Court and of counsel for the plaintiff below to an alleged error upon the admission of testimony

which could and would be met be a reference to the statute itself.

We have two answers to make to the new points raised in the latest brief of counsel.

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**A GENERAL OBJECTION IS NEVER GOOD IF THE TESTIMONY COMPLAINED OF IS ADMISSIBLE FOR ANY CONCEIVABLY VALID PURPOSE.**

If testimony of a particular kind is admissible for any purpose, it cannot be ruled out on a general objection that it is immaterial, incompetent or irrelevant, without pointing out the specific vice.

Burton v. Driggs, 20 Wall. 125-134.

Here the defendant objected to a copy of an instrument on the ground that it was not an original, and the Court held that, in view of the universal rule allowing proof by copy, the plaintiff was entitled to make the proof in the absence of a specific objection that the copy was not authentic or that there was a lack of the proper foundation.

If under any view of the facts and the pleadings in the case at bar, evidence of the good reputation of the plaintiff was admissible, we respectfully submit that the exception to the evidence in question cannot be urged here under a general objection. We pointed out in our former brief that Sutherland on Damages accords with the view that evidence of good character is admissible in all cases where malice is laid with the object of obtaining exemplary damages. Newell on Slander and Libel (3rd ed.,

Sec. 1036), after stating the strict rule laid down by the line of authorities cited by the plaintiff in error from states not having statutes declaring the contrary rule, as in California, says:

> "But such evidence is admissible under special circumstances to show the libel was false to the knowledge of the defendant and must, therefore, have been written maliciously."

We urge this as justifying the admission of the evidence in question under the rule contended for by counsel. We still urge, however, that such testimony is always admissible upon the general issue by virtue of section 2053, C. C. P. And finally we most strenuously urge that

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**THE ASSIGNMENT OF ERROR IS NOT PROPERLY BEFORE THE COURT UPON A SUFFICIENT EXCEPTION.**

We take the following from 3 Corpus Juris, p. 746, sec. 639:

> "When an objection is made, the trial Court and opposing counsel are entitled to know the ground on which it is based, so that the Court can make its ruling understandingly and so that the objection can be obviated if possible; and therefore as a general rule, objections, whether made by motion or otherwise, * * * to the evidence, * * * must, in order to preserve questions for review, be specific and point out the ground or grounds relied upon, and a mere general objection is not sufficient."

And at page 892, sec. 800, it is stated that,

> "Only the grounds of an objection urged in the trial Court will be considered on appeal."

The rule has been uniform in Federal Courts that a general objection to a question as "immaterial, incompetent and irrelevant" is insufficient to sustain an assignment of error.

Minchen v. Hart, 72 Fed. 294;
Eli Mining Co. v. Carleton, 108 Fed. 24;
Davidson Steamship Co. v. U. S., 142 Fed. 315;
Shandrew v. Chicago etc. R. Co., 142 Fed. 320.

In the last case Adams, Circuit Judge, says:

> "To object to a question because it is 'immaterial' or 'irrelevant', without specifying why or in what particular, imposes a burdensome duty upon the Court to immediately and carefully scrutinize the pleadings, with a view of ascertaining therefrom whether under any conceivable theory the proposed evidence would be material or relevant; a duty which from the nature of things, the Court can, at the outset of the trial, with difficulty perform. Counsel, on the contrary, from their familiarity with the case, not only understand the issues, but doubtless understand the immediate or remote bearing of any kind of evidence, and can readily advise the Court why or in what respect a given question is immaterial or irrelevant. *These observations apply with equal or greater force to an objection on the ground of incompetency. A witness may be incompetent as such, or the oral evidence of a fact, when some writing exists, may be incompetent evidence. Which of these, or many others that might be specified, is it?* This can readily be answered by counsel. If he makes an objection, either on the ground of immateriality or incompetency, he knows his reasons for so doing, and must, unless it appears from the connection that the question is obviously

> or clearly inadmissible, state them, if he desires to claim error by reason of the Court's action. The reasons for this rule may also be put on broader grounds. Counsel are officers of the Court in quite the same sense as the judge is. Both are engaged in the serious work of administering justice. They should, therefore, work together to that end. Candor and freedom from reserve or disguise should equally characterize their conduct." (The italics are ours.)

Certainly it cannot be said by counsel for the plaintiffs in error that there are not competing analogies between the rule as they claim it is laid down in Davis v. Hearst and the rule laid down by section 2053, C. C. P., and that the occasion to determine incompetency of the testimony in the one case or the competency of it in the other did not create a condition for the trial Court such as Judge Adams declares should not be allowed to occur.

The general rule we have just stated has never been modified except in so far as the demands of justice have required, and we respectfully represent that no case has been made here by the plaintiffs in error for a departure from the rule.

Dated, San Francisco,
March 25, 1916.

Respectfully submitted,

JACOB M. BLAKE,
*Attorney for Defendant in Error.*